Supreme Court, U. S.
FILED
DEC 21 1977
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977
NO. 76–1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, etc., et al.,

Petitioners,

v.

MARIE MANHART, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE*

The ACLU Foundation of Southern California is an organization dedicated to the preservation of the rights guaranteed by the Bill of Rights of the Constitution of the United States. Included in this is the equal protection of the laws, which encompasses, inter alia, equality of employment opportunities regardless of race, color, religion, sex, or national origin.

The instant case involves important questions concerning employment discrimination because of sex. Defendants on their appeal challenge and seek to overturn the lower courts' decisions which invalidated that discrimination. Amicus

*The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

believes the rulings of the District Court and the Court of Appeals were correct and seeks to present its views in this regard. Hence this brief amicus curiae.

STATEMENT OF THE CASE

Separate and unequal retirement plans were effectively maintained by the petitioner, City of Los Angeles Department of Water and Power. One plan was for its male employees. The other plan was for its female employees who, as a class, are the respondents. Membership in one plan or the other was compulsory for all employees. Although the plans resembled each other, in that they awarded benefits according to similar rules, each of the two plans had its own members and beneficiaries, its own sources and rates

of funding, and its own actuarial foundation:

--Only men and their families were members and beneficiaries of the male fund. Only women and their families were members and beneficiaries of the female fund.

--No men contributed to the female fund. No women contributed to the male fund.

--Contributions to the male fund were determined by actuaries who relied on mortality tables for the male population. Contributions to the female fund were determined by actuaries who relied on mortality tables for the female population.

--The female fund required a woman to contribute approximately 15% more money each month than the male fund required of the women's male counterpart.

The respondents brought suit in the District Court for the Central District of California, complaining of the facts above and praying for equalization of rates of contribution for counterparts. The District Court granted a preliminary injunction equalizing rates of contribution, and the Court of Appeals for the Ninth Circuit affirmed.

SUMMARY OF THE ARGUMENT

As reflected in the retirement programs which it has created, Congress has defined equality in this context as the opportunity for male and female counterparts to receive equal monthly retirement benefits at equal cost to them. Men do not subsidize women in Congress's plans any more than shorter-lived persons subsidize longer-lived persons in any

insurance program. But the petitioner's plan disadvantaged women by requiring them to pay more for the same benefits.

Sex is not the only predictor of longevity. Even if it were, the petitioner could have spread the cost of longevity over the class of all employees (as Congress has) either by constructing a unisex mortality table or by assessing the cost of extra female longevity equally to all employees. By using sex both to measure and to spread the cost of longevity, the petitioner segregated its female employees and disadvantaged them because of their sex.

ARGUMENT

The issue in this case is the definition of equality of opportunity in the

context of retirement funds.[1] Because the total contributions paid into, and the total benefits paid out of, the petitioner's female retirement fund exceeded those of its male fund, the petitioner would define equality as the opportunity for the class of each sex to benefit from a fund in proportion to its contributions to the fund; that is, the ratio of contributions to benefits must be the same for each of two sex-segregated funds, regardless of the effect on the members' standards of living.[2] In contrast, the

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[1] See Gold, "Equality of Opportunity in Retirement Funds," 9 Loy. L. A. Law Rev. 596 (1976).

[2] This definition includes the petitioner's plan, in which females paid a higher rate of contribution in order to receive equal monthly benefits, and actuarially equivalent plans in which females paid the same rate of contribution and received lower monthly benefits. Because this definition would be satisfied if there were no plan for one sex at all, or if one plan offered substantially lower benefits so

respondents define equality simply as the opportunity for a male and a female to receive equal monthly benefits from a retirement fund at equal cost to them; that is, to the extent that their employer is responsible for it, counterparts[3] are entitled to enjoy the same standard of living during their working years and during their retirement.

Which definition is correct? Are separate and unequal retirement funds permitted by Title VII of the Civil Rights Act of 1964? The best approach to it is to determine the intent of Congress.

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[2](Continued) long as funding was proportionate to benefits, two provisos are necessary: there must be plans for each sex; and either contributions by counterparts must be the same, leading to disparate monthly benefits, or females' contributions must be higher, leading to equal monthly benefits.

[3]Counterparts are a male and a female who were born on the same date, entered the service of the employer on the same date, and had identical employment histories.

I. By deviating from Congress's definition of equality of opportunity in retirement funds, the petitioner disadvantaged female employees.

While there is little express legislative history on Congress's definition of equality of opportunity in the context of retirement funds, a colloquy between Senators Randolph and Humphrey is enlightening. The former mentioned that the Social Security System treats men and women differently in some respects and inquired whether similar differences in industrial benefit plans could continue under the bill which became Title VII; the latter answered affirmatively. 110 Cong. Rec. 13663-4 (1964). The Social Security System did not then, and it does not now, distinguish between male and female counterparts for purposes of employees' contributions to and

benefits from the Old-Age and Survivors and Disability Insurance trust funds. 42 USCA §§ 401(a) et seq. Men and women make equal contributions to the trust funds during their working years, and they receive equal monthly benefits from the funds during their retirement. If, which is likely, Congress believed the Social Security System treated men and women fairly and was a proper model for private retirement plans, it certainly did not intend to approve plans like the petitioner's, which result in unequal standards of living for counterparts.[4]

[4]The analogy between the Social Security System and the petitioner's plan is particularly compelling because of their similarity to each other and their difference from annuity contracts offered by insurance companies. In the case of an annuity contract, the policyholder pays the company a lump sum of money and, in return, the company pays him a smaller sum of money on a periodic basis until he dies. There is a direct correlation between the consideration which the policyholder pays for the annuity contract and the level of periodic benefits which the company returns. By

Another indication of Congress's definition of equality in retirement funds lies in the various other funds which it has created: for plainly Title VII was

[4](Continued) contrast, defined-benefit plans like the petitioner's base retirement benefits on length of service and final average compensation (see petitioner's brief at p. 4); a retiree's benefit is not calculated simply by taking the dollars in his account, adding interest, and spreading the total over his life expectancy. Thus, what Mr. Justice Harlan wrote of the Social Security System is equally true of the petitioner's plan: "eligibility for benefits, and the amount of such benefits, do not in any true sense depend on payment of taxes [or contributions], but rather on the earnings record of the primary beneficiary [the employee]." Flemming v. Nestor, 363 U.S. 603 at 609 (1960).

The similarity between the petitioner's plan and the Social Security System suggests an analogy to cases like Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) and Califano v. Goldfarb, 430 U.S. 199 (1977). The case at bar is not so extreme as the Social Security cases, for the respondents or their families were not deprived of benefits altogether; but it remains that women had to pay a higher price for benefits than their male counterparts had to pay. Because of the petitioner's discriminatory plan, the labor of women provided them with "less protection than [was] produced by the efforts of men." Califano v. Goldfarb, 51 L. Ed. 2d at 276.

not meant to upset existing retirement funds created by federal statute, and it is unlikely that Congress used one definition of equality in creating its plans and intended another definition to govern private funds. In addition to the Social Security trust funds, Congress has created the following retirement and disability funds:

--Civil Service Retirement and Disability Fund, 5 USCA §§ 8331 et seq.

--Central Intelligence Agency Retirement and Disability Fund, Pub. L. 88-643, 50 USCA § 403 note.

--Foreign Service Retirement and Disability Fund, 22 USCA §§ 1061 et seq.

--Railroad Retirement Account, 45 USCA §§ 231 et seq.

Consistent with the Social Security trusts, and different from the retirement plan of the petitioner, none of these federal funds segregates the sexes: none of them withholds higher contributions

from a female's check than from her male counterpart's, and all of them pay counterparts equal monthly benefits in retirement.

In addition to creating the retirement and disability funds listed above, Congress has provided for retirement benefits to be paid to the following classes of federal employees:

--armed forces personnel, 10 USCA §§ 1401 et seq.

--judges, 28 USCA §§ 371 et seq.

There are no deductions from the employees' paychecks, so male and female counterparts receive equal monthly benefits in retirement at equal monthly cost to them during their working years.

Thus, it has been the consistent practice of Congress, both in its provision for workers at large through the Social Security System and in its provision for federal employees through

trust funds and general-revenue obligations, to provide equal monthly retirement benefits to male and female counterparts at equal monthly cost to them. Neither the statutes creating the various federal retirement programs, nor their legislative histories, indicate Congress believed the female employees of government needed special treatement. Congress provided counterparts with equal monthly retirement benefits at equal monthly cost to them because that reflected its definition of equality of opportunity in the context of retirement systems. Nothing in Title VII or in its legislative history suggests that Congress intended a different standard to apply to private systems.

The effect of Congress's practice has been to spread the cost of human longevity over the class of all

employees. For a retirement fund is an insurance scheme designed to spread the risk or cost of longevity over a class of persons, and whoever would establish a fund must decide into which classes he will divide people. Initially, there are two possibilities: a single class of all persons, or a set of subclasses of persons. If subclasses are chosen, there is the further choice of which subclasses to use: one possibility is to define them according to immutable characteristics like race or sex; another possibility is to define them according to the degree of presence of factors known to affect longevity (e.g. use of alcohol and tobacco, obesity, family medical history, job stress, exercise, etc.) Whichever set of subclasses be chosen, the effect of the choice is to spread the cost of longevity of that subclass over that

subclass alone. But this was not the choice of Congress. Rather, Congress chose the class of all employees and spread the cost of human longevity over the universe of the entire labor force. It is inevitable, of course, that shorter-lived persons will "subsidize" the benefits of longer-lived persons: depending on the classifications chosen for analysis, men will subsidize women, blacks will subsidize whites, smokers will subsidize nonsmokers, etc. But there is no unlawful discrimination, not only because Congress said so, but also because nothing in the Constitution or in the Title VII gives an employee reason to complain of being classified as a person.

Of course, the petitioner's shibboleth and cudgel is that men should not subsidize the benefits of women.

(It is somehow indifferent to the fact that blacks are subsidizing the benefits of whites, smokers are subsidizing the benefits of nonsmokers, etc.) Evidently, Congress did not share the petitioner's belief. Congress believed that it was entirely proper to spread the risk of human longevity over the universe of all persons, regardless of sex, race, or any other factor. Some reasons why Congress thought as it did may be suggested.

First, unless funds are race-segregated as well as sex-segregated, blacks will subsidize the benefits of whites because blacks have a shorter life expectancy. (It may be the other way around, but it does not matter.) Congress believed, and quite properly so, that neither race nor sex is a proper classification for this or any other purpose of employment (unless, in the

case of sex, it is biologically necessary, as when a sperm donor or a wet nurse is needed).

Second, Congress may have had reference to unemployment insurance and workers' compensation plans, which do not distinguish between male and female employees, though one sex most certainly draws greater benefits and is "subsidized" by the other.

Third, Congress may have noted that men tend to earn higher income than women of like qualifications; this was the very reason for the Equal Pay Act, 29 USCA § 206(d), and probably a large part of the reason for Title VII itself. Taking this reality into account, Congress may have decided that, if men do subsidize benefits for women to some extent, the effect is the same as a progressive tax which falls more heavily on those better able to bear it.

Finally, Congress may have recognized that life expectancies are only averages that are not accurate as applied to individuals, particularly when only a single factor like sex is employed. Many females predecease their counterparts, and many others survive them by less than the average number of years -- with the result that, for these women, under plans like the petitioner's the female never catches up with her counterpart: she has paid more dollars in contributions, and she dies before she can recoup them in benefits. But this cannot happen in plans of Congress's creation, for it has defined equality in this context as the opportunity for each individual person to receive equal monthly retirement benefits at equal cost to him. Congress has decided that equality lies, not in treating a person as a member of a class

protected by Title VII, but in treating a person as an individual and guaranteeing him the same standard of living as any other person during his working years and during his retirement. This same emphasis on people's rights as individuals, not as members of classes, lies behind the emphasis on the individual in the language of §§ 703(a)(1) and (2).

It is clear, therefore, that the petitioner's sex-segregated retirement funds did not conform to Congress's definition of equality of opportunity in the context of retirement funds. By charging women a higher rate of contribution, the petitioner disadvantaged them by reducing their standard of living during the forty years of their working lives.[5] It now remains to determine

[5] Inspite of this plain deviation from the intent of Congress, the petitioner argues that

whether the petitioner disadvantaged the

[5] (Continued) its practice was approved by this Court in General Electric v. Gilbert, 429 U.S. 125 (1976). Yet the petitioner ignores a significant difference between Gilbert and its predecessor, Geduldig v. Aiello, 417 U.S. 484 (1974), on the one hand, and the case at bar, on the other. Geduldig and Gilbert held that an employer may exclude a risk from an insurance package; however, no risks were excluded from the petitioner's plan: indeed, there was only one risk, longevity, and it was fully covered because benefits were payable until death.

The troublesome class in Geduldig and Gilbert was composed of pregnant women; the effect of those cases is to allow an employer to leave the cost of pregnancy on pregnant women, rather than spreading this cost over the class of all employees. The effect of the petitioner's plan was quite different. The troublesome class was composed, not of women who are pregnant, but of women who outlive their male counterparts. If the petitioner's plan allocated the cost of benefits for such women -- approximately 16% of the class of women; see Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975) -- to that class itself, this case would be analogous to Geduldig and Gilbert; in fact, however, the petitioner's plan allocated the cost of benefits for the "superannuated 16%" to the class of all women, as all women were assessed a higher rate of contribution in order to fund benefits for the few women who outlived their counterparts. There was no sex discrimination in Geduldig and Gilbert because both men and nonpregnant women were protected from the cost of benefits for pregnant women, and there would have been no sex discrimination in the case at bar if both men and shorter-lived women had been protected

respondents because of their sex.

II. By measuring and spreading the cost of longevity over sex-segregated classes, the petitioner disadvantaged its female employees because of their sex.

The petitioner claims it charged females higher contributions than their

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[5](Continued) from the cost of extra female longevity. But there was sex discrimination in the case at bar because no women were protected from the cost of benefits for the few who outlived their counterparts, just as there would have been discrimination in Geduldig and Gilbert if the cost of pregnancy had been assessed, not to pregnant women only, but to all women -- and no men.

To have eliminated the discrimination in the case at bar, the petitioner would have had to protect both men and shorter-lived women from the cost of extra female longevity (as both men and nonpregnant women were protected from the cost of pregnancy) or to protect neither men nor women from this cost. The former alternative would have been possible (assuming the date of death of a given individual cannot be predicted with certainty) only by cutting off benefits for all retirees at the same age, which would have been undesirable. The latter alternative would have been possible simply by spreading the cost of extra female longevity over the class of all employees, which could have been achieved by any of the means discussed below at p. 28-30.

male counterparts because sex-segregated mortality tables reveal that, of the class of men and women aged 65 years, more women survive to age 66 than do men; more women survive to age 67 than do men; etc.: that is, the woman whose date of death coincides with the sum of the ages at death divided by the number of deaths for her sex -- the "average women" -- outlives the "average man." The petitioner asserts that it relied on sex-segregated tables because no others were available. Should this assertion prove false, the petitioner's sex bias would be clear, however widely it may have been shared.

And is not this assertion patently false? Whatever data were available to insurance companies were available to the petitioner's actuaries, and for many years insurance companies have based their decisions on whether to issue life and

annuity policies, and have adjusted their rates for these policies, by taking into account not only sex, but also various other factors which affect longevity, including use of alcohol and tobacco, obesity, family medical history, job stress, exercise, etc. Sex is one predictor of longevity, but there are others.[6]

Why did the petitioner choose sex instead of one of the other predictors, or a combination of them? Why did the petitioner segregate and classify its female employees to their disadvantage

[6]The life styles of women are changing. Increasingly, women are assuming roles in employment which were in the past reserved for men, and surely this effect was foreseeable to Congress, if it was not its very purpose, when it added the sex clause to Title VII. It can be expected, therefore, that sex will decrease in importance as a predictor of longevity, and it is not unreasonable to suppose that Congress could have foreseen this possibility as well.

in violation of the clear language of § 703(a)(2)? If it claims the reason was administrative convenience, it must be admitted that sex-segregated mortality tables were easy to use, much easier than treating employees as individuals, some of whom drink alcohol, smoke tobacco, are overweight, have high blood pressure, do stressful work, or are female. But this Court has never allowed administrative convenience to stand as justification for unlawful discrimination. Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). As the Court has written:

> "[A]ny statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .' Reed v. Reed 404 U.S. at 77." Frontiero v. Richardson, 411 U.S. 677 at 690 (1973).

Surely Congress intended to afford women at least as much protection from sex discrimination in employment as the Constitution affords them from discrimination in other areas. But when the the petitioner classified its employees according to sex in order to predict their longevity, studiously ignoring every other relevant classification which also predicted longevity, it unlawfully discriminated against its female employees because of their sex.[7]

The petitioner argues that it charged women higher contributions, not because

[7] It may be argued that there is no end to the number of factors which affect longevity, yet there must be an end to the number of factors considered in funding a retirement plan. But this argument does not advance the petitioner's case because the answer is not to rely exclusively on a factor which is a classification prohibited by Title VII; the answer is simply to ignore all such factors and use a unisex mortality table.

they were women, but because they outlive men. The availability of predictors of longevity besides sex conclusively answers this argument, for non-smokers outlive smokers, etc., and the petitioner did not assess these persons higher contributions. The legislative history of Title VII is an additional answer. An amendment was offered which would have limited the protection from sex discrimination to discrimination based solely on sex. The amendment was defeated. 110 Cong. Rec. 2728. Neither sex itself, nor a characteristic which might be associated with sex, may lawfully be the basis of an employment decision. Congress knew that sex is an involuntary and immutable characteristic, and it prohibited employers from disadvantaging individual women because of a characteristic of the class (longevity) which

might be -- but generally is not -- true of them as individuals.

The petitioner argues that it used sex-segregated mortality tables because there was no alternative way accurately to measure the longevity of its employees and fund their retirement benefits. This argument fails on two counts, for it is not only simply wrong but, even if it is right, it ignores the difference between measuring a cost and funding that cost.

It is wrong to argue that sex-segregated mortality tables were the only way accurately to measure longevity because any employer with a work force the size of the petitioner's could easily have constructed a unisex mortality table applicable to itself by determining the ratio of its male-to-female employees and extrapolating from sex-segregated tables. Once such a table was constructed

(of course, it could have been modified from time to time to reflect changes in the composition of the work force), it could have been used to predict longevity with as much accuracy as the sex-segregated tables on which it was based, and it could also have been used to determine equal contributions from male and female counterparts to the retirement fund.

The argument that only sex-segregated mortality tables were available fails on a second count because, assuming a unisex table could not have been constructed, there remained the fundamental difference between measuring a cost and funding that cost. Even if sex-segregated mortality tables were absolutely necessary <u>to predict</u> longevity, and from it the costs of future retirement benefits, such tables <u>did not dictate</u> that females had to

contribute more than males. Employee contributions to the fund could have been set, in the first instance, by reference to male mortality tables; then, any shortfall in funding could have been supplied directly by the petitioner or could have been assessed in equal shares to counterparts. Either way, the petitioner's plan would have remained actuarially sound.[8]

The petitioner discriminated against women by segregating them into a separate class from men. The petitioner could have used a discrete number of factors to define the classes over which it measured and spread the cost of longevity; men and women, blacks and whites, et al. would

[8] In other words, the petitioner has always been able to spread the cost of longevity over the class of all employees. Indeed, that is its present practice, as required by Cal. Gov. Code § 7500.

have been mixed throughout these classes, and there would have been no discrimination. The petitioner could have used all possible factors for measuring and spreading the cost of longevity by constructing a unisex mortality table; each person would have been treated, not as a member of a class, but as a human being, equally suseptible to the various influences on longevity, and no one would have had reason to complain. Or the petitioner could have relied on sex-segregated mortality tables to predict the cost of longevity and, once the cost was known, spread that cost equally over the class of all employees; again, each person would have been in the same position as any other person. But the petitioner did none of these. Ignoring Congress's example of equality in retirement funds, the petitioner utilized sex both as the

only predictor of longevity and as the basis for funding its segregated retirement plans. That insurance companies are guilty of the same discrimination is no excuse for the petitioner; sex discrimination in America is old and deep, but Title VII meant to end it in the field of employment. A simpler case of sex discrimination cannot be imagined: the petitioner segregated women into a separate class from men, and it broke the law.

CONCLUSION

It would be a strange anomaly if this Court should say to the respondents herein: "When Congress created the Social Security System, it intended for you and your male counterpart to enjoy the same standard of living during your working

years and during your retirement. When Congress passed the Equal Pay Act, it intended to guarantee that your employer would not force you to accept a lower standard of living than he provided your counterpart. When Congress provided for the retirement of civil servants, it observed these principles by offering counterparts equal standards of living during their retirement at equal cost to them during their working years. But when it passed the Civil Rights Act, Congress undid much of what it had previously done, for it intended to allow the petitioner to charge you a higher rate of contribution to the retirement fund, and relegate you to a lower standard of living than your counterparts, during the forty years of your working lives."

For these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December, 1977.